IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78–527

COURIER-NEWSOM EXPRESS, INC.,

Petitioner,

vs.

MARTIN IMPORTS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent, Martin Imports, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *Martin Imports vs. Courier-Newsom Express, Inc.*, 580 F.2d 240 (7 Cir. 1978). The Opinion of the United States District Court for the

Northern District of Illinois, Eastern Division, is unreported. Both Opinions are fully reproduced in the Petition for a Writ of Certiorari at A-4 and A-15 respectively.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered June 30, 1978, reversing the Judgment of the District Court, and entered Judgment for Respondent in the amount of $2,891.15. Petitioner did not file a Petition for Rehearing. This Court's jurisdiction is involked by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a regulated motor common carrier have a duty to give notice to the consignor that the goods tendered to it will not be delivered within the usual transit time and will be subjected to freezing weather conditions?

2. Does a motor common carrier have a duty to provide safe and adequate service, equipment and facilities for the transportation of property it accepts for carriage?

STATUTE INVOLVED

The statute involved in this case is found at 49 U.S.C. §§ 20(11) 319, and 316(b). These are reproduced in relevant part at A1 herein.

STATEMENT OF THE CASE

At approximately 4:30 p.m. on December 23, 1974, Courier-Newsom Express, Inc. (Petitioner) received a shipment of 250 cases of wine at the facilities of Respondent's agent in Chicago, Illinois for delivery to Respondent's customer in Rockford, Illinois. At the time of receipt, Petitioner's driver observed the wine and acknowledged receipt in apparent good order and condition by his signature on a bill of lading. The trailer in which the wine was placed returned to Petitioner's terminal between 6:15 and 6:30 p.m. on December 23, 1974. Petitioner's driver informed Petitioner's terminal manager of his arrival, and placed the trailer outside of the terminal at the dock closest to the terminal office, which is customary when the trailer contains alcoholic beverages.

The wine remained out of doors at Petitioner's terminal in an unheated and uninsulated trailer until approximately 2:00 a.m. on the morning of December 24, 1974, when the trailer was picked up with a tractor by another driver and driven to Rockford, Illinois, 87 miles away. No other freight was transported to Rockford, Illinois in that trailer and the entire trip took approximately 3 hours. The trailer arrived in Rockford at approximately 5:00 a.m.

The driver left the trailer at Petitioner's Rockford terminal. Petitioner's Rockford, Illinois terminal was closed, and no employees were present. Petitioner's collective bargaining agreement with its personnel provided that both December 24 and 25, 1974 were holidays. At the time the shipment was accepted, and when it left Chicago, Illinois,

Petitioner knew that its Rockford, Illinois terminal would be closed when the wine arrived in Rockford.

The unheated and uninsulated trailer remained in Petitioner's terminal yard in Rockford, Illinois until the morning of December 26, 1974. During this period the temperature in Rockford, Illinois was close to or below freezing, ranging from 6 degrees to 35 degrees Fahrenheit. On December 26, 1974 Petitioner tendered the wine to the consignee for delivery. The consignee refused to accept delivery because the wine was frozen, and many of the bottles had exploded.

The wine was then returned to Chicago, and stored in a public warehouse pending final disposition. Respondent seasonably filed a claim with Petitioner in the amount of $3,291.15 which was declined, and this litigation followed.

Respondent brought this action on November 18, 1975 under 49 U.S.C. § 20 (11), jurisdiction in the District Court being invoked by 28 U.S.C. § 1337. Upon submission of 25 stipulated facts, cross-motions for summary judgment were filed on July 7, 1976 and August 17, 1976, respectively. These motions were denied by the District Court on December 6, 1976.

A trial without jury was held on March 9 and 16, 1977 and the District Court entered judgment for Respondent on the latter date.

Petitioner filed a motion to alter and amend the findings of fact and conclusions of law. The District Court granted that

motion and entered judgment in favor of Petitioner. Thereafter, Respondent filed an appeal with the Seventh Circuit Court of Appeals which reversed the judgment of the District Court and entered judgment in favor of Respondent in the amount of $2,891.15.

REASONS THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW IS SUPPORTED BY THE EVIDENCE ADDUCED IN THE DISTRICT COURT

The Court of Appeals decision is well-reasoned, indicates intimate knowledge with the trial record and is amply supported by the evidence adduced at trial or stipulated facts. The Court of Appeals reasoned that Petitioner breached its duty to inform Respondent that this shipment would not be handled within the expected transit time. The Court further held that Petitioner breached its statutory duty under 49 U.S.C. §316(b) by its failure to provide safe and adequate service, equipment and facilities for the transportation of wine. Both of these findings are supported by the evidence adduced at trial, the stipulated facts and judicial precedent.

The Court of Appeals did not conclude that there was a delay in delivery of this shipment. In fact, at 580 F.2d 243 (7 Cir. 1978), the Court held that "while delay in delivery of the wine, arguably may have been reasonable, failure to advise the shipper in advance of the abnormally long delivery time was not." Closely following the stipulated facts and trial record, the Appellate Court held that Petitioner knew when it accepted the shipment that it contained wine, and knew that due to a

collective bargaining agreement it would not be delivered the next day, as shipments tendered on Mondays normally would be. Referring to the record, the Appellate Court held that there was nothing adduced at the trial to show that Respondent knew or should have known that under Petitioner's collective bargaining agreement with its employees, December 24, 1974 was a holiday. Following the decision in *Shippers Service Co. vs. Norfolk & Western Railway*, 528 F.2d 56, 59 (7 Cir. 1976), the Appellate Court held that once a shipper shows delay, the "burden to come forward with an explanation for the delay properly belongs on the defendant." The only explanation offered by the Petitioner for the delay was the collective bargaining agreement. The Appellate Court refused to impute knowledge of that agreement to Respondent.

The Court of Appeals did not speculate when it found that the consignee was a small family-run business. On cross-examination, the consignee's Vice President testified that his business was a "family corporation" in which he was Vice President and his father was President. (A2)

It is irrelevant whether Petitioner had knowledge that the consignee's place of business was open or not on December 24. The facts as supported by the record are that Petitioner's Rockford, Illinois terminal was closed on December 24th and consequently no one was there to notify the consignee that this shipment had arrived. The consignee, as Respondent's customer, did not instruct Respondent to withhold deliveries to it on December 24th. Nor is there anything in the record which indicates that Petitioner would have handled this shipment differently had it known that delivery could not have been made on December 24th. Had the consignee made

arrangements to receive this shipment on December 24, delivery still would not have been made because Petitioner would not and could not deliver on that date. Had Petitioner's driver attempted to make delivery at the consignee's door on the morning of December 24th, delivery could have been accomplished by the consignee's non-union employees. At the very least, an attempt would have been made to put the consignee on notice that the wine had arrived. In fact, the trial record reflects that only the consignee's union employees did not work on December 24th. There is nothing in the record to support Petitioner's argument that the consignee's business was closed entirely on that date and delivery was impossible.

The Court of Appeals did not hold that Petitioner was bound to transport this shipment within a certain time period other than with reasonable dispatch. Petitioner's argument that this shipment was transported within the usual transit time assumes that December 24, 1974 was a holiday merely because it was declared as such by a collective bargaining agreement to which Petitioner is a party. The evidence adduced at trial leads to the opposite conclusion.

It was stipulated at trial that "the usual transit time from Chicago to Rockford on less than truckload volume shipments, such as the shipment which is the subject of this suit, is next morning or second day delivery." A carrier's own schedules constitute prima facie evidence of the obligation to transport property with reasonable dispatch. If December 24th was a holiday observed by Petitioner, such an unusual departure from normal business practice should have been published in Petitioner's tariffs and made known to the public. Absent such a publication or notification, the public cannot possibly to

aware of facts which are known only to the Petitioner. To conclude that this shipment was transported within Petitioner's established schedule, the Court of Appeals would have had to assume that December 24th was a holiday known to all. The Court correctly refused to make such an assumption.

If Respondent knew that Petitioner would not make delivery on December 24th, why would this shipment have been made on December 23rd? Respondent would have held this shipment until December 26th had it known that Petitioner would deliberately expose the wine to subfreezing temperatures for several days. In Respondent's business, the day preceding Christmas is its busiest of the year. The Court below logically concluded that "it was not unreasonable for it to assume that Petitioner would also be open for business that day." 580 F.2d 240, 243 (7 Cir. 1978). In fact, the Court of Appeals did not conclude that there was a delay in delivery of this shipment. It merely held that Petitioner failed to inform Respondent that this shipment would not be transported within the usual transit time, facts which were peculiarly the knowledge of Petitioner.

II. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, AND OTHER COURTS OF APPEALS

Petitioner contends that the Appellate Court found it negligent for failure to provide temperature control service. This argument mischaracterizes the Appellate Court decision.

Throughout the history of this case, Petitioner has argued that despite its acceptance of the wine without objection or protest, it had no obligation to protect the wine against freezing, because it had no tariff provision that offered protective service against cold. In other words, Petitioner argues that a motor common carrier can deliberately accept perishable goods; deliberately be negligent in its care of these goods so that it freezes; and rely on the fact that it does not publish a tariff offering protective service against heat or cold to exonerate it from common carrier liability.

This illogical position ignores plain common sense, and is contrary to a common carrier's obligation as set forth in the Interstate Commerce Act, 49 U.S.C. §§ 20(11), 316(b) and 319. (A1) This position is nothing more than an attempt to limit Petitioner's liability under the Interstate Commerce Act, which the Act expressly prohibits. These statutory provisions make motor common carriers liable for the full actual loss, damage or injury caused by them to property they transport, and prohibits all limitations on their liability, except as specifically authorized by statute. This codifies the common law rule that a common carrier is liable for damage to goods transported by it unless the carrier can show that it was free from negligence and the damage was caused solely by one of the five exceptions to common carrier liability. Thus, in an action by a shipper to recover for damage to a shipment, the shipper establishes a prima facie case when it shows delivery in good condition, arrival in a damaged condition, and the amount of damages. The burden of persuasion then shifts to the carrier to show that it was free from negligence and that the damage was due solely to one of the five exceptions. If proven, this relieves the carrier of liability. *Missouri Pacific Railroad Co. vs. Elmore & Stahl,* 377 U.S. 134 (1964).

This case has nothing to do with tariffs or requests for protective service. Protective service was not requested, was not provided and could not have been provided by Petitioner. The Court of Appeals recognized at 580 F.2d 244 that Petitioner's tariffs must be strictly adhered to but properly concluded that there were "other means of protecting the wine, i.e., placing the shipment inside appellee's terminal in either Chicago or Rockford." The protective service argument is irrelevant and merely diverts this Court's attention from the true issue in this case.

That issue is, "what are the duties of a common carrier with respect to goods it accepts for transportation?" Petitioner publishes a rate in its tariffs on file with the Interstate Commerce Commission for the transportation of wine in all kinds of weather conditions. This implies that the Petitioner has adequate facilities for the transportation of wine and knowledge that wine will freeze if exposed to sub-freezing temperatures for several days. When a common carrier publishes rates on wine, and accepts wine for transportation under all circumstances, it cannot be allowed to brazenly state that it is not required to protect that wine from known hazards, including freezing. To do so would permit a common carrier to accept any shipment for transportation and then completely ignore the nature of the commodity and have no concern for its safe transportation.

This would be contrary to Section 316(b) of the Interstate Commerce Act which provides, in part, that:

> "It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the transportation of property. . . . "

This statutory provision does not require a motor carrier to offer the entire gamut of specialized services. A common carrier may decline a shipment if it does not have adequate facilities to provide safe transportation. But once a shipment is accepted and the carrier knows that protective service will not be afforded, the carrier is liable for loss and damage due to the failure to provide reasonable care under the circumstances. *Johnson Motor Transport vs. United States,* 149 F. Supp. 175, 179 (Ct. Cl. 1957).

Petitioner cites several railroad cases in support of its position that it could not protect this shipment from freezing because of the absence of a tariff provision. None of these cases stand for the proposition relied upon. None were decided after *Elmore & Stahl,* supra., and must be read in light of that opinion. Their precedential value has obviously diminished. All of these decisions have been discredited by the intervening decision in *Elmore & Stahl,* which renders moot any possible conflict between the decision below and the decisions Petitioner cites. The Appellate Court was aware of these decisions and either distinguished them or correctly concluded that they lacked precedential value.

In *Chicago and Alton R.R. vs. Kirby*, 225 U.S. 155, 56 L. Ed. 1033 (1912) this Court held that a railroad could not privately agree and guarantee to transport a shipment within a particular time. Factually, the *Kirby* case is unlike this action. There was no private agreement between Petitioner and Respondent to provide protective service. A request for protective service would have been fruitless since Petitioner could not have provided it.

Keogh vs. Chicago & N.W.R. Co., 260 U.S. 156, 67 L. Ed. 183 (1922), was an antitrust action where rates approved by the Interstate Commerce Commission were under attack. *Keogh* is distinguishable on its facts. There is no rate dispute in this case. In fact, Petitioner has received all applicable transportation charges published in its tariffs on file with the Interstate Commerce Commission.

Davis v. Cornwell, 264 U.S. 560, 68 L. Ed. 848 (1924) involved a shipper request for auxiliary transportation service that was not provided for in the carrier's tariffs. Although the carrier privately agreed to provide this service, it failed to do so, and the goods were damaged. There was no private agreement between Petitioner and Respondent for any auxiliary transportation service. Petitioner accepted the wine with full knowledge of what it was and assumed its usual common carrier obligation under the Interstate Commerce Act.

In *Northern Wisconsin P. Co. v. Chicago & N.W. Ry. Co.*, 234 N.W. 726 (1931) a railroad was requested on its bill of lading to provide heat protective service for which no tariff provision existed. The Wisconsin Supreme Court held that the carrier was not negligent because it failed to provide heat

protective service without applicable tariff provisions. The *Northern Wisconsin* case is different from this action in that the bill of lading herein contains no request for protective service. Clearly, application of the principles promulgated by this Court in *Elmore & Stahl* indicate that the *Northern Wisconsin* case was overruled sub silentio. In *Elmore & Stahl*, a specialized protective service was requested by the shipper and provided by the carrier. Despite this, the goods were damaged upon arrival at destination and this Court found the carrier liable for the loss.

Atchison, T. & S.F. Ry. Co. vs. Springer, 172 F.2d 346 (7 Cir. 1949) was an action by a railroad to recover unpaid demurrage charges. The shipper filed a counterclaim for damages that resulted from the carrier's failure to follow reconsignment instructions. Reconsignment was an ancillary transportation service for which no rates were published in the carrier's tariff. *Springer* is distinguishable from this action on its facts. Respondent never requested any ancillary transportation services from Petitioner. Respondent merely anticipated that Petitioner would exercise reasonable care to protect this shipment from foreseeable harm.

Petitioner argues that the decision below is "particularly startling" in view of *Pilgrim Distributing Corp. vs. Terminal Transport Co., Inc.*, 383 F. Supp. 204 (S.D. Ohio, 1974). The *Pilgrim* case is distinguishable on both the facts and the law. The District Court's decision in *Pilgrim* was decided on a carrier's liability as a warehouseman, not common carrier liability under the Interstate Commerce Act.

In *Pilgrim* the carrier accepted wine for transportation on a bill of lading prepared by the shipper. A notation was made on the first and third copies of the bill of lading to protect the shipment from freezing, but the second copy tendered to the carrier did not contain this notation. The shipper, therefore, prejudiced itself by attempting to defraud the carrier, and the court was understandably inclined to hold against the shipper on any set of facts. The carrier did have tariff provisions which provided for heat protective service. Although the trailer was equipped with heat protective equipment, the shipper, through its agent, had sealed the trailer and the carrier did not have access to the heat protective equipment. Upon arrival at destination the goods sat at the carrier's terminal for 27 days awaiting customs clearances and delivery instructions from the consignee. Since the *Pilgrim* shipment was an import shipment, delivery to the consignee without customs clearances was impossible. Clearly, the delay was caused by the consignee not the carrier.

By contrast, in this action Respondent did not request heat protective service because such a request would have been futile. The delay was solely the fault of Petitioner. Since Petitioner had loaded this small shipment in its own trailer, unsealed, it had access to this shipment. It only had to place the trailer or the wine inside its terminal in order to protect the wine from freezing.

Everything contained in the *Pilgrim* decision after the third paragraph in the second column at 383 F. Supp. 209 is dicta. The Court's holding is clearly based on the liability of the carrier as a warehouseman, after expiration of free time to unload, and not the stricter common carrier liability set forth in

the Carmack Amendment to the Interstate Commerce Act. The dicta in the *Pilgrim* case has no bearing on the outcome of this case.

CONCLUSION

The issues raised by Petitioner are insignificant and do not warrant this Court's review. The decision below was based upon its own facts and will not affect other litigants. The Appellate Court's decision follows an unbroken line of authority that has emanated from *Elmore & Stahl*, supra. All the allegedly conflicting decisions cited by Petitioner precede *Elmore & Stahl* and are distinguishable on both the law and the facts. For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted

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APPENDIX

49 U.S.C. § 20, (11) in relevant part:

> " . . . a common carrier . . . subject to the provisions of this part receiving property for transportation . . . shall issue a . . . bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it . . . and no such contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability imposed; . . . and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void. . . "

49 U.S.C. § 319 in relevant part:

> "The provisions of Section 20(11) . . . of this Act, . . . shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

49 U.S.C. § 316(b) in relevant part:

> "It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the transportation of property . . . "

(TR. pg. 8, March 16, 1977)

JAENICKE – CROSS

BY MR. STEINER:

Q. Good morning, Mr. Jaenicke.

A. Good morning, sir.

Q. I didn't catch your position with Jaenicke Distributors. What is that position?

A. This is a family corporation, and I am the vice president. My father being the president.

Q. Okay. Do you run the operation or does your father run the operation?

A. Pretty well, although he is active in the business.

Q. But largely you are the one who controls the operation?

A. That is right.